

ON the 9th day of December, 1993, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge Marvin R. Appling on October 21, 1993, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by his attorney, Fred Spigarelli, of Pittsburg, Kansas. The respondent and insurance carrier appeared by their attorney, Leigh C. Hudson, of Fort Scott, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Special Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) What is the nature and extent of claimant's disability?
- (2) What is claimant's average weekly wage?
- (3) Is respondent and insurance carrier entitled to reimbursement from the Kansas Workers Compensation Fund for vocational rehabilitation expenses ordered paid by the Special Administrative Law Judge and temporary total disability ordered paid pursuant to the vocational rehabilitation order of the Special Administrative Law Judge?
- (4) Is compensation due, including underpayment of temporary total disability benefits?
- (5) Is claimant entitled to unauthorized medical expenses?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) The claimant, George Voller, is entitled to an award of 12 percent permanent partial disability to the body as a whole on a functional basis as a result of an injury occurring on February 26, 1990, arising out of and in the course of his employment with Kelly Truck Lines.

The Workers Compensation Appeals Board on review of any act, finding, award, decision, ruling or modification of findings or awards of the Administrative Law Judge shall have the authority to grant or refuse compensation, or to increase or to diminish the award of compensation or to remand any matter to the Administrative Law Judge for further proceedings. 1993 Session Laws of Kansas, Chapter 286, Section 53(b)(1).

Claimant, a 46-year old truck driver, was injured on February 26, 1990, when a bungy cord that he was using to tie down a load broke causing him to fall off of his rig, injuring his left arm, neck and shoulders.

Claimant returned to work for a short period of time but was unable to continue working and sought medical care.

Claimant was examined by Dr. Armen Marouk, a neurosurgeon, for the injury suffered to his neck and shoulders. Claimant was diagnosed as having a damaged cervical disc at the C5-C6 level with C6 radiculopathy, a tardy left ulnar palsy indicating constriction of the ulnar nerve in the left elbow, and a pinched nerve in his neck from intraspinal nerve compression.

On May 10, 1990, claimant underwent an anterior cervical discectomy and uncinectomy which involved removing the ruptured disc and the bony spur of the spine which was pressing on the nerve.

Dr. Marouk assessed claimant a seven percent impairment to the body as a whole functionally, for the neck injury and assessed a 15 percent impairment to the left forearm and hand which converts to a five percent permanent partial impairment to the whole body on a functional basis. When combined the two ratings equate to a 12 percent whole body general disability on a functional basis. The claimant was returned to work on October 29, 1990, with limitations to the left hand and forearm but was not restricted in his ability to perform work as a result of the neck injury.

Both claimant and Dr. Marouk felt claimant was capable of returning to work as a truck driver. Claimant did return to work as a truck driver for a period of several hours on October 29, 1990. Claimant, in his own opinion, was capable of safely driving a semi-trailer truck with his only concern being the limitation of sensation in the left hand and arm, and headaches.

On October 29, 1990, while tying down his load, claimant's left arm gave out causing him to again fall from his truck, landing on his upper torso and fracturing his right wrist. Claimant was treated for the right wrist fracture and returned to Dr. Marouk alleging renewed and increased symptomatology to the neck, shoulders and the back. Subsequent to the October 29, 1990 injury, claimant experienced muscle spasms and tenderness, severe range of motion restrictions of the neck and shoulders in all directions, and severe headaches so dramatic in nature as to interfere with claimant's ability to see.

As a result of this new and distinct injury Dr. Marouk's rating to the neck increased to a 15 percent whole body impairment on a functional basis and claimant was assessed a five percent permanent partial impairment to the shoulder. The impairment to claimant's left hand and arm did not change.

K.S.A. 1992 Supp. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record."

K.S.A. 199 Supp. 44-508(g) states:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Claimant was examined by Dr. Edward Prostic on July 15, 1991. Dr. Prostic, in opining that claimant's objective and subjective complaints related back to the February 26, 1990 injury, does not appear to be credible and his opinions do not appear to be supported by the medical record and work history established in this matter. Dr. Prostic was not provided a complete history of claimant's past injuries. Having only the June 17, 1991 report of Dr. Marouk, Dr. Prostic was clearly denied important medical evidence regarding claimant's condition from February 26, 1990 through October 29, 1990. Without access to this medical information Dr. Prostic would not be in a position to state within a reasonable degree of medical probability what, if any, symptoms and/or restrictions claimant would have suffered during the time period between the original injury on February 26, 1990, and the second injury on October 29, 1990.

Dr. Prostic admitted that the range of motion studies of the claimant subsequent to the first injury would be important in evaluating what, if any, restrictions would be applicable to which injury. At the time of Dr. Prostic's examination claimant suffered severe range of motion limitations. Dr. Prostic was unable to say within a reasonable degree of medical probability whether these limitations applied to the original injury in February, 1990, or the subsequent injury in October, 1990. As such, the medical testimony of Dr. Prostic is not deemed relevant to the issues raised by this docketed claim.

As of October 29, 1990, Dr. Marouk felt claimant was capable of returning to work as a truck driver with restrictions only to his left hand and arm. Claimant admitted to being able to return to Kelly Truck Lines as a truck driver with his only concerns being the left hand and forearm and the headaches which he had experienced prior to his return to work.

K.S.A. 1992 Supp. 44-510e(a) states in part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Claimant returned to work at Kelly Truck Lines, though for a very brief period, doing the same duties and earning the same wages as he had at the time of the original injury on February 26, 1990.

The Appeals Board finds that, based upon a review of the entire record, claimant has failed to show by a preponderance of the credible evidence that the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e(a) has been overcome. As such, claimant is limited to a functional impairment as a result of the accidental injury of February 26, 1990.

K.S.A. 1992 Supp. 44-510e(a) states in part:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

Dr. Marouk, the treating physician, and the only testifying doctor who had the opportunity to fully examine claimant subsequent to the first injury in February, 1990, and prior to the second injury of October 29, 1990, rated claimant at seven percent to the body as a whole on a functional basis as a result of his neck injuries and 15 percent to the left upper extremity. These ratings combined equal a 12 percent permanent partial impairment to the body as a whole on a functional basis. This functional impairment stems from the injuries suffered on February 26, 1990. While there was discussion during the oral argument regarding the subsequent injury in October, 1990, Docket No. 150,420, that case is not on before the Appeals Board and said issues cannot be considered at this time.

(2) The Appeals Board finds that the information provided in the record supports an average weekly wage of \$403.00 per week.

(3) The respondent and its insurance carrier, Travelers Insurance Company, are entitled to reimbursement from the Kansas Workers Compensation Fund for vocational rehabilitation expenses incurred including temporary total benefits and vocational rehabilitation vendor fees ordered in this matter.

The Order of the Special Administrative Law Judge dated September 3, 1991, required the respondent to provide vocational rehabilitation benefits to the claimant and further required temporary total to be paid during this vocational rehabilitation period. Benefits in the amount of \$6,622.36 representing 24.65 weeks of temporary total at the rate of \$268.68 per week were paid for the period August 29, 1991 to March 20, 1992. The Order further required the respondent to pay for the vocational rehabilitation vendor fees totaling \$2,601.90.

As the Appeals Board has found the injury of February 26, 1990, resulted in a functional impairment only, vocational rehabilitation benefits stemming from that injury would be inappropriate. Pursuant to K.S.A. 44-534a(b), the Appeals Board herein requests that the Workers Compensation Director certify to the Commissioner of Insurance for payment to the respondent, Kelly Truck Lines, and its insurance carrier, Travelers Insurance Company, the sums of \$6,622.36 temporary total reimbursement and \$2,601.90 vocational rehabilitation reimbursement, for a total reimbursement sum of \$9,224.26.

(4) The Appeals Board further finds claimant is entitled to 35 weeks of temporary total disability at the rate of \$268.68 per week, totaling \$9,403.80 followed by 380 weeks of permanent partial disability benefits at \$32.24 per week, totaling \$12,251.20, for a 12 percent permanent partial general body disability on a functional basis making a total award of \$21,655.00.

(5) Claimant is entitled to unauthorized medical in the sum of \$350.00 pursuant to K.S.A. 44-510(c).

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Special Administrative Law Judge Marvin R. Appling dated October 21, 1993, is hereby modified and an award of compensation is hereby entered in favor of the claimant, George Voller, and against the respondent, Kelly Truck Lines, and its insurance carrier, Travelers Insurance Company, as follows:

The claimant is entitled to 35 weeks temporary total disability at the rate of \$268.68 per week, totaling \$9,403.80, followed by 380 weeks of permanent partial disability benefits

at \$32.24 per week, totaling \$12,251.20 for a 12 percent permanent partial general body disability on a functional basis, making a total award of \$21,655.00.

As of January 10, 1994, there would be due and owing to the claimant 35 weeks temporary total compensation at \$268.68 per week in the sum \$9,403.80 plus 167.14 weeks permanent partial compensation at \$32.24 per week in the sum of \$5,388.59, for a total due and owing of \$14,792.39 which is ordered paid in one lump sum less amount previously paid. Thereafter, the remaining balance in the amount of \$6,862.61 shall be paid at \$32.24 per week for 212.86 weeks or until further order of the Director.

The Appeals Board further finds that claimant is entitled to unauthorized medical expenses up to \$350.00.

Further award is made that claimant is entitled to future medical treatment upon proper application to and order from the Director.

Fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed against the respondent and insurance carrier to be paid as follows:

PATRICIA K. SMITH, C.S.R.	
Deposition of George Voller	\$ 164.80
MARTIN D. DELMONT, C.S.R.	
Transcript of Preliminary Hearing	\$ 230.60
Deposition of George Voller	\$ 213.05
Transcript of Regular Hearing	\$ 73.90
Deposition of Karen Sherwood	\$ 159.55
Deposition of Dr. Armen Karouk	\$ 344.65
Total	\$1021.75
HOSTETLER AND ASSOCIATES, INC.	
Deposition of Dr. Edward Prostic	\$ 192.40
Deposition of Patty Perdaris	\$ 177.50
Total	\$ 369.90
MARVIN R. APPLING	
Fees as Special Administrative Law Judge	\$ 150.00

IT IS SO ORDERED.

Dated this _____ day of January, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Fred Spigarelli, P.O. Box 1449, Pittsburg, Kansas 66762
Leigh C. Hudson, P.O. Box 866, Fort Scott, Kansas 66701
Marvin R. Appling, Special Administrative Law Judge
George Gomez, Director